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IN THE

Supreme Court of the United States

October Term, 1956

No. 282

SALVATORE APUZZO,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SALVATORE APUZZO,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Salvatore Apuzzo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

Opinions Below

There was no opinion in the United States District Court, Southern District of New York (Dimock, J.) upon appellant's conviction. An opinion by District Judge Noonan, upon petitioner's pretrial motion challenging the validity of the issuance of search warrant for the search and seizure of records, appears at pages 56-57 of Appendix C, *infra*. In the Court of Appeals, upon rehearing by the Court *en banc*, there were three separate opinions—not yet

officially reported—all for affirmance of petitioner's conviction. The opinion of Chief Judge Clark, concurred in by Judge Medina, is printed at pages 30-45 of Appendix A, *infra*. The separate concurring opinions of Judges Hincks and Waterman are printed at pages 45 to 54, Appendix A, *infra*.[1] Judge Lumbard had disqualified himself.

Petitioner's application for rehearing before six judges, following the *en banc* determination by four judges, was denied, without opinion (p. 55, Appendix B, *infra*).

Statement of Jurisdiction

The Court of Appeals affirmed the conviction of the petitioner by judgment dated and entered May 28, 1957.

Petitioner duly filed a petition for rehearing *en banc* before six judges (Subd. c, Sec. 6, Title 28, U. S. Code; cf. *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.*, 345 U. S. 247), which was denied by order of the Court of Appeals dated and entered on June 18, 1957 (p. 55, Appendix B, *infra*). This petition is filed within thirty days thereafter.

The mandate of the Court of Appeals has been stayed by order of the Court of Appeals dated June 18, 1957

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[1] "Judge Frank heard the argument of this case on the original hearing and on the rehearing *en banc* and voted to reverse and remand, preparing supporting memoranda to that effect. He died, however, before this opinion was written." (Footnote, Court of Appeals Opinion, p. 29, *infra*).

Judges Clark, Frank and Waterman comprised the Court of Appeals panel which originally heard the appeal. Judges Frank and Waterman "concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial." (Judge Waterman's opinion, p. 49, *infra*).

pending application for certiorari pursuant to its Rule 28(c) (p. 55, Appendix B, *infra*).

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure.

Questions Presented

1. (a) Where an experienced federal law enforcement officer's recitation of the substance of his conversation with a defendant on direct examination, in response to the prosecutor's broad, generic interrogation on the subject, is devoid of all reference to incompetent and prejudicial matter, is defendant's counsel precluded via waiver and estoppel from objecting to the officer's injection of incompetent, prejudicial testimony relating to defendant's prior arrest on cross-examination in response to a question no different from the prosecutor's?

(b) Does not the injection of necessarily indelible, incompetent, and prejudicial testimony by an experienced federal law enforcement officer divulging to the jury that a defendant had been arrested on a prior occasion and charged with a crime which is an essential element of the prosecution—where defendant had not testified at the trial—permeate the trial with a degree of unfairness and make it an unfair trial, which this court in its supervisory role should discountenance under the doctrine of *McNabb* v. *United States*, 318 U. S. 332 by invalidating a conviction had under such circumstances?

2. May a search warrant validly be issued by a federal court directing search for and seizure of records purport-

ing to connect a person with the business of receiving wagers—admittedly a state but not a federal crime—and then, may evidence thus obtained be utilized by the Government in a prosecution for failure to pay the wagering tax?

Reasons for Granting the Writ

1. This Court in *McNabb* v. *United States*, 318 U. S. 332, has charged itself with "the duty of establishing and maintaining civilized standards of procedure and evidence" (p. 340) and the formulation of "rules of evidence to be applied in federal criminal prosecutions" (p. 341). The instant case uniquely appeals to the dual burdens which this Court has assumed.

The introduction at the trial of evidence of petitioner's prior arrest under the circumstances which brought about its disclosure evoked four different interpretations from the five members of the bench of the Court of Appeals of the Second Circuit who heard the appeal. Judges Clark and Medina held that the admission of the evidence was not error. Judge Hincks held that it was error but that it was not prejudicial because the proof of petitioner's guilt was so overwhelming. Judge Waterman opined that the admission of the evidence of the prior arrest was error and prejudicial but that it was cured by the trial court's instructions to the jury. Finally, Judge Frank concluded that the admission of the evidence was erroneous and fatally prejudicial in spite of Judge Dimock's words to the jury. The results of this multiplicity of judicial opinions are that petitioner is faced with the loss of his liberty and the federal courts are without guide as to the "stand-

ards of procedure and evidence" to be followed and the "rules of evidence to be applied" in this important aspect of criminal prosecutions.

A final and conclusive determination of the criteria to be observed in cases such as this should be made by this Court.

2. This case, in addition, presents the question of the validity, under the Fourth and Fifth Amendments of the Constitution of the United States and Rule 41(b)(2) of the Federal Rules of Criminal Procedure, of a search and seizure, the fruits of which were the backbone of the Government's case. The preservation of petitioner's constitutional rights and the sound administration of criminal justice require a determination by this Court whether a search warrant may be validly issued under the circumstances of the instant case.

Statement of the Case

The petitioner was tried on two informations: Information No. C 145-283 charging the petitioner in two counts with (a) failure to pay the special tax imposed upon persons engaged in the business of accepting wagers and (b) failure to register to pay the tax; and Information No. C 147-278 charging the petitioner in one count with conspiring with two other individuals to commit those crimes. The statutes violated are Title 26, United States Code, Sections 2707(b), 3277, 3290, 3291(a), 3292 and 3294, and Title 18, United States Code, Section 371 (2, 3).[2]

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[2] Numeral references are to pages in "Appellant's Appendix" in Court of Appeals, unless otherwise noted.

After a trial lasting five court days, the jury on November 15, 1955, returned a verdict of guilty on each of the two counts of Information No. C 145-283, and on the one count of Information No. C 147-278.[3]

The circumstances giving rise to the filing of the charges may be briefly summarized. In the latter part of July, 1953 and early in August, 1953, two Government agents, Goodwin and Fletcher, made or placed "policy" or "number" bets in a butcher shop located at 383 Lenox Avenue, New York City. These wagers were made on various days during a one hour period between 12:30 and 1:30 in the afternoon with either the co-defendants Aaron or Broussard--butchers working behind the meat counter (13-14). *No bets were ever placed or made with appellant, the owner of the shop.* These Agents spent, at most, two, three or four minutes in the store on each occasion and did not see appellant at any time. However, one Agent saw meat being sold (12).

On August 5, 1953, pursuant to a search warrant issued by Hon. Edward Weinfeld, United States District Judge,

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[3] Petitioner was sentenced to 60 days imprisonment and to pay a fine of $3,000. on the first count of Information #C 145-283; on the second count, imposition of sentence was suspended and petitioner was placed on probation for a period of four years after sentence on the first count. On Information #C 147-278 imposition of sentence was suspended and petitioner was placed on probation for a period of four years after sentence on the first count of Information C 145-283 (61-62, 65-66).

Trial was had on both informations without an order of consolidation under Rule 13 of the Federal Rules of Criminal Procedure. The government's application to consolidate for trial—made subsequently to the actual commencement of the trial—was denied by the Trial Court on appellant's objection to the consolidation (pp. 282, 411, 487, Original Record).

Co-defendants Aaron and Broussard pleaded guilty to the substantive counts (Information C 145-283) before trial and their case was severed (2, 3, Original Record).

a raid was made on the butcher shop premises at 363 Lenox Avenue by Treasury Department agents Guthrie, Gianatasio, Lemler and Di Cupua (18-19) of the Alcohol & Tobacco Tax Division (13). These agents entered with guns drawn (27) without notice and went into a back room or office of the store where they found appellant with three other men, none of whom was later arrested. The appellant, at the time, was inspecting ties which an itinerant salesman was offering for sale (21). Appellant was surprised and startled by the raid (pp. 92, 206, Original Record) and at first stated that he was merely visiting the premises. He readily identified himself (21, 26; p. 38, Original Record). The agents searched him and found approximately $1300. in cash on his person (p. 38, Original Record). One of the agents said he knew appellant was the owner of the butcher shop (p. 151, Original Record).

After routine questioning during which appellant stated that he was in the butcher business (29) for 15 or 20 years (35), the agents and appellant proceeded to the front of the store in which were located a meat counter filled with meat (19-20), a safe and a refrigerator. Appellant was asked to open the safe. At first, he said that he did not know or had forgotten the combination (pp. 39, 338, Original Record) or that someone else had the combination (21). When told that it would be necessary to remove the safe from the premises and break it open, appellant opened the safe.

A defense witness, Arthur Isidori, appellant's brother-in-law, who had been in appellant's employ as a butcher for 6 years (54), testified that appellant, in an excited state, telephoned him for the combination (55). This call was either denied or not remembered by the government

agents (29). In the safe, containing several compartments (p. 343, Original Record) with locks (22), were found approximately $10,000 in cash, bank books in the appellant's name, insurance policies belonging to appellant and two envelopes, one containing nine undated policy slips and another containing six undated policy slips (15-17). Other persons had access to this safe (21, 24, 54). All of these items were seized by the Treasury agents and, in addition, they took invoices (31-32) covering purchases of large quantities of meat just prior to the period in question (50), and checks which the butcher shop had cashed for customers (30-31; p. 129, Original Record). Appellant admitted that the cash found in the safe was his and stated that he kept his money there because the Federal Government had impressed liens upon his assets in connection with income tax claims (22) then pending in the U. S. Tax Court (24).

The agents then inquired of all whether there were any policy slips in the store in addition to the ones found in the safe. They testified that appellant pointed to the scale on the counter and told Broussard, who was behind the counter, to "give them the slips." Broussard removed the weighing platform of the scale and the part supporting it. Inside were found approximately 150 policy slips (17, 23, 25-26, 31-34, 35, 50).

Broussard had been waiting on a customer buying meat when the raiding party first entered the premises (53). He said that appellant had instructed him to *give the agents the policy slips if he, Broussard, knew anything about them.* He testified further that appellant knew nothing about policy slips and did not know that Broussard had been accepting policy bets for about two months.

Broussard declared that in response to appellant's request, he went to the scale and gave the Treasury men the policy slips (53). The Government witnesses denied that such a conversation between appellant and Broussard took place (50-51).

At the trial it was stipulated by the Government and appellant, since appellant contended that he was not engaged in the business of accepting wagers in 1953, that he did not pay the special tax and did not register (pp. 279-280, Original Record). Appellant at no time admitted any participation in the business of accepting wagers (23) nor was he ever connected or identified as such (23-24), although viewed by at least 21 persons (pp. 166, 235, Original Record). In fact, he vigorously denied it on interrogation at his apprehension (29-30). No written statement was ever taken of appellant (34), albeit one was taken of Broussard (p. 330, Original Record).

On direct examination by the prosecutor, Vincent J. Gianatasio, a Government Agent assigned to the Alcohol & Tobacco Tax Division for over 20 years (footnote 7, *infra*), was asked to state the nature of conversation that had been had by the government agents with petitioner in the back room, and Gianatasio answered the question without making reference to any incompetent prejudicial matter (8a, Government's Appendix; pp. 190, 191, Original Record).[4] Specifically, on direct examination, Gianatasio

[4] The direct interrogation and response were as follows:

"Q. Were you present when *any* conversation was had with the defendant Apuzzo in the back room? A. Yes.

Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear."

did not assert that he had queried petitioner with regard to a prior arrest and that he had elicited the admission that petitioner, on a prior occasion, 15 years ago, had been arrested for "policy."

However, when petitioner's counsel asked Gianatasio the self-same question regarding the conversation—even pinpointing as the prosecutor had done, the back room as the place where the conversation took place (35, compare prosecutor's question, footnote 4, *supra*)—Gianatasio, surprisingly enough, blurted out, "I asked him if he was ever arrested before" (35). Over petitioner's objection to this sudden launching into inadmissible prejudicial matter, the trial court authorized the agent to increase the damage by permitting him to give petitioner's alleged answer which, according to the agent, was ". . . he told me he had been arrested for policy about 15 years ago" (36).

Petitioner at once moved for a mistrial (36, 39).

Subsequently, the trial judge himself took full responsibility for this prejudicial disclosure and admonished the jury to disregard it (49), reserving decision on petitioner's motion for a mistrial until after the jury brought in a guilty verdict (55-57).

Appellant did not take the witness stand.

Pre-trial motions were made attacking the issuance of the search and seizure warrant and seeking the return of certain property seized and its use suppressed. These motions were denied (58-59, 63-64) without affording appellant a hearing as requested. In a nutshell, appellant argued that the government was attempting to obtain evi-

dence that appellant was operating a lottery—a state crime and not a federal offense—in violation of Rule 41 (b)(2) of the Federal Rules of Criminal Procedure.

These motions were denied respectively by District Judge Noonan, with opinion (pp. 56-57, *infra*) and District Judge Walsh, without opinion (63-64). These motions were renewed at the trial and denied as well by the Trial Court (pp. 40-52, Original Record).

ARGUMENT

I

Judges Clark and Medina, upon the rehearing by the Court of Appeals sitting *en banc* (see footnote 1, *supra*) after noting "the potential importance of the question in the administration of the criminal law," and that "the principles of procedure are most important" (30, 43, *infra*) held that appellant's counsel had opened the door to Gianatasio's testimony by his query on cross-examination, that the federal agent's answer was responsive and that petitioner may not object to the response he draws (pp. 39-40, *infra*).

Judge Hincks, in his concurring opinion, nevertheless held that error was committed when the Treasury Agent testified regarding petitioner's prior arrest (pp. 45-46, *infra*) but that such error was not of sufficient substance, since proof of petitioner's guilt was strong (pp. 46-47, *infra*).

Judge Waterman, in his concurring opinion, agreed with Judge Hincks that Agent Gianatasio had introduced error into the case with his statement that petitioner had told

him he had once before been arrested for policy (pp. 48-49, *infra*). Judge Waterman acknowledged that when the original bench, consisting of Chief Judge Clark, and Judges Frank and Waterman, had heard the case (footnote 1, *supra*),

> "He (Judge Frank) and I concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial."

Judge Waterman continued:

> "At this term by memorandum vote after the hearing *en banc*, he reaffirmed his belief that the conviction should be reversed. It is, I think, of importance that his opinion be known, for it demonstrates that three of the five appellate judges who have considered the case concur with the district judge who tried it that the injection into the trial of this statement of a prior arrest was error" (p. 49, *infra*).

Judge Waterman took issue with Judges Clark, Medina and Hincks' view that petitioner's proof of guilt was overwhelming, stating:

> "The defense could well maintain that there was insufficient credible proof of any 'policy' participation by Apuzzo during the nine crucial days involved" (p. 53, *infra*).

Finally, however, Judge Waterman, who had originally voted for reversal with the late Judge Frank, decided to concur in the affirmance of petitioner's conviction on the ground that the trial judge had cured the error—"of such an exceptionally prejudicial character"—by clearly instructing the jury to disregard it (p. 54, *infra*).

A.

The opinion of Judges Clark and Medina that petitioner's counsel had opened the door to the Treasury Agent's testimony and had lost status to object to the prejudicial response, appears to be based in large measure, upon the erroneously purported circumstance—repeatedly stressed in the majority opinion—that petitioner's question dealt with a new conversation.

Thus, at page 37, *infra*, Judges Clark and Medina state:

> "Further colloquy ensued both before and out of the presence of the jury, in which the prosecutor pointed out that his questions on direct had been limited to certain particular incidents and defendant's counsel had opened the question of a more general conversation in the back room."

Again, at page 39, *infra*, they state:

> "We have already noted that this particular cross-examination opened up an entirely new conversation."
>
> (See also p. 39, *infra*.)

It is true that the prosecutor in his colloquy did claim, overgenerously, that his questions on direct had been limited in scope, as the above-quoted opinion states, but the record actually belied such assertion. The prosecutor's statement to the court was as follows (37):

> "May I say to your Honor that when I asked the questions I specifically tied it in with certain incidents. I asked him if there was a conversation with regard to the safe, as I recall it. I asked him if there was a conversation with regard to the scale.

> Now, this question, as I recall it, (210) was much broader than that. *He asked him if he had any conversation at all in the back room with him.*" (Emphasis supplied.)

Actually, however, as we have shown by our quotation from his direct examination at footnote 4, *supra*, it was the prosecutor himself who generally called for *any conversation in the back room* (without limitation to the scale or safe) and the petitioner, far from "opening up an entirely new conversation" as Judges Clark and Medina wrote, took pains not to elaborate or stray beyond the scope of the prosecutor's question on direct examination (8a, Govt.'s Appendix).

Defense counsel had also insisted as follows:

> "He (the prosecutor) asked him what the conversation was and he (the witness) didn't bring it out" (36).

Since Judges Clark and Medina's "opening the door" theory is thus based on a factual misconception, it follows that its validity is destroyed by the exposure of underlying factual error. One could safely speculate that such was the reason for Chief Judge Clark's apparent dissent from the majority of the panel which originally voted to reverse the petitioner's conviction (pp. 30, 49, *infra*).

Moreover, a witness' words, basically incompetent and irrelevant to the issues, and steeped in prejudicial influence, are not rendered unobjectionable by the circumstance that the interrogator had couched his question in colloquially generic terms. Sheer literal responsiveness of the answer is not the sovereign consideration overriding all the basic rules of evidence. A broad question may be put

by counsel for one side and permitted to go, unchallenged by his adversary without either being committed, beyond redemption, via waiver and estoppel, to any outlandish disfigurement of the precepts of trial evidence that may be vented by the witness.

Thus the defendant need not record objection to a proper question by the prosecutor to a government witness on direct examination, asking him to relate his conversation with the defendant ~~under penalty~~ of forfeiting his right to object to the witness' recitation of conversation relating to inadmissible prior offenses or other excludable subjects. The question is not deemed to authorize the witness to go off on a tangent of inadmissible testimony but contemplates that he confine himself to the bounds of the frame of reference set up by the rules of evidence.

See *Brown* v. *United States* [3 Cir.], 83 F. 2d 383, 386 in which the court wrote:

> "The testimony of the previous conviction of Carinelli should not have been admitted, and when the fact of Carinelli's previous conviction was included in the answer to a proper question, it should have been stricken out."

See, also, *United States* v. *James* [2 Cir.], 208 F. 2d 124.

At 23 Corpus Juris Secundum, Sec. 1070, p. 502, "Criminal Law", the text states:

> "Thus, where it is not apparent from the question that the answer will be inadmissible, as where an improper answer is given to a proper question, the question need not have been objected to in order to entitle the objecting party to move to strike out the answer;"

By the same token, when defense counsel is cross-examining a government witness, particularly an experienced federal law enforcement officer—a person who though he be not an attorney is nevertheless necessarily schooled in the rules of evidence and as they relate to his courtroom functions—the officer has the same obligation to stay within permissible evidentiary bounds which he had on direct examination.

Indeed, having confined himself to admissible conversation on direct examination, it would constitute sheer entrapment if upon cross-examination directed to the same subject-matter as his direct examination, he could launch into incompetent, prejudicial fields.[5]

In *Parilla* v. *U. S.* [6 Cir.], 280 F. 761, 765, the Court noted:

> "There may be cases where an answer is formally responsive, but yet where a part of it is so plainly incompetent and so far beyond anticipation that examining counsel would not be estopped to move to strike out that part;"

This was said in a case in which defendant's counsel had indeed made the prosecution's witness his own by address-

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[5] In *United States* v. *Silver* [2 Cir.], 235 F. 2d 375, cert. denied, 352 U. S. 880, cited in the opinion (p. 41, *infra*) of Judges Clark and Medina, the defendant had put his character in issue. Moreover, the question there permitted related to defendant's character. Arrest does not (*Michelson* v. *United States*, 335 U. S. 469, 482). The miscellany of other cases cited (p. 41, *infra*) are likewise drastically different from the instant case. The text of Sec. 18, p. 344, Wigmore, Evidence, 3d ed., to which footnote 34 is appended, also cited, reads:

> "Of course, also the opponent whose *question calls in advance* for obviously inadmissible evidence has waived objection to the answer." (Italics in original.)

ing to the witness questions beyond the scope of interrogation on direct examination, thus indicating that even when the defendant can be said to have "opened the door", the rule of waiver or estoppel based thereon will not be enforced in a criminal case when it would be unfair to the defendant to do so. *A fortiori*, when the defendant has not made the government witness his own, and a classic case of an incompetent answer beyond anticipation is foisted upon the trial proceedings by the witness—as in our case—waiver and estoppel to object must be completely ruled out.

Judges Clark and Medina, also invoked the rule of "Verbal Completeness" to justify the Treasury Agent's right to testify on cross-examination that petitioner told him of his prior arrest (p. 42; *infra*).

This argument is cogently refuted in the separate opinion of Judge Hincks (p. 46, *infra*) who wrote:

> "In this situation, I think, the judge erred in insisting on a continuation of the narration of the conversation. I see nothing to suggest that in the situation presented the discontinuance of the narration at the instance of the defense would subject the prosecution to the hazard of an unfavorable inference or would in any way operate to warp the truth or confuse the jury. That being so, I doubt the applicability of the doctrine of "Verbal Completeness" to which the majority opinion refers. But even if at all applicable, the rule of completeness is subject to a very reasonable qualification: 'where the remainder (of the conversation) is incompetent not merely as to form as in the case of secondary evidence or hearsay, but *because of its prejudicial character* then the trial judge should

> exclude if he finds that the danger of prejudice outweighs the explanatory value.' McCormick on Evidence, page 132. In other words, when—as here—the continued narration of a conversation will bring in inadmissible matter possibly prejudicial and adds nothing to a solution of the issues, neither the judge nor the opposing counsel may properly cause it to come in. *Gencarella* v. *Fyfe*, 1 Cir., 171 F. 2d 419; *People* v. *Baker*, 290 Ill. 349, 125 N. E. 263; *People* v. *Schlessel*, 196 N. Y. 476, 90 N. E. 44; *Hathaway v. Tinkham*, 148 *Mass.* 85, 19 N. E. 18. 20 Am. Jur., Evidence, Sec. 276; McCormick on Evidence, page 132, footnote 6; 31 C. J. S., Evidence, page 917 and footnote 82."

Moreover, in our case, we have the paramount consideration that the testimony of the Treasury Agent regarding petitioner's prior arrest was incompetent from its very outset—the officer's statement that he had asked petitioner regarding prior arrests was itself incompetent and highly prejudicial, and as we have already urged, not within the actual scope of the question either on direct or on cross-examination. Thus, there was no admissible evidence subject to "Verbal Completeness" and the doctrine could have no possible application and is not eligible to be invoked to sanction the Treasury Agent's further testimony regarding the petitioner's response to his query.[6]

Although petitioner first moved for a mistrial when the Treasury Agent was permitted to state petitioner's response to the Agent's inquiry to petitioner regarding prior

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[6] Petitioner's counsel, when the government agent injected the words, "I asked him if he was ever arrested before" (35), at once sought to accord his client maximum protection by further questions designed to de-emphasize and withdraw from the matter (36), but he was not permitted to do so (36; p. 45, *infra*).

arrest and did not move for a mistrial when the Agent first volunteered the information that he had questioned petitioner about prior arrests, it is clear that the waiver of right to demand mistrial was conditional upon petitioner being permitted to shut off this line of testimony by the Agent and thus keep from the jury the fact that the petitioner had had a blemish of a prior arrest for a policy violation.

Once the Agent was permitted to state under court aegis that petitioner had made the prior arrest admission, petitioner's motion for a mistrial must be deemed to relate back to the Agent's testimony that he had asked the arrest question since the Agent's question and the petitioner's answer once given, form a single objectionable entity.

The suggestion in the opinions of Judges Clark and Medina that the testimony of petitioner's prior arrest might have been admissible, even if elicited by the prosecutor (1499), is also unsound for the residual reason that prior arrest is not to be equated with prior conviction on the score of admissibility (*Michelson* v. *United States*, 335 U. S. 469, 482), although, unfortunately, for appellant the two are to be equated from the standpoint of prejudicial effect (*United States* v. *James* [2 Cir.], 208 F. 2d 124, *supra*).

B.

Judge Hincks despite his disagreement with the majority and his firm opinion that error had been committed, decided to affirm petitioner's conviction on the ground that he deemed the evidence against appellant to have been strong (pp. 46-47, *infra*). The opinion of Judge Waterman to the contrary, however, more accurately it is respectfully

submitted, reflects the state of the record and the applicable law. He wrote (pp. 52-53, *infra*):

> "Apuzzo's employees testified stoutly, also. If they were believed, there was similarly sufficient evidence to support a verdict of acquittal. The defense could well maintain that there was insufficient credible proof of any 'policy' participation by Apuzzo during the nine crucial days involved.
>
> Although on the record before us it is highly probable that appellant may be guilty as charged, I do not find that this 'record fairly shrieks the guilt', *Butwak* v. *United States*, 344 U. S. 604, 619 (1953), of Apuzzo during the time-period involved, nor do I believe that no reasonable jury could have acquitted. See, e.g., *United States* v. *Chieppa*, 241 F. 2d 635, 640 (2d Cir. 1957); *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (2d Cir. 1952), *cert. denied*, 344 U. S. 864.
>
> Therefore, it becomes a most delicate question for an appellate judge who believes that the evidence below of guilt is not completely overwhelming to appraise the effect that Gianatasio's statement may have had. For Gianatasio let the jury know that Apuzzo, himself, allegedly had said to the witness that he had been arrested for 'policy' about fifteen years ago. Even though instructed that the statement should be ignored, this statement, erroneously before the jury, could well be the decisive bit to convince a doubting juror of the defendant's guilt."

Judge Waterman noted succinctly (pp. 50-51, *infra*):

> "The Supreme Court has stated the test as follows:
>
> 'In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety,

> tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. * * *
>
> 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress: *Bruno* v. *United States, supra* (308 U. S. 287), at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' *Kotteakos* v. *United States,* 1946, 328 U. S. 750, 762, 764-765."

Judges Clark and Medina stated "All four agents testified, without substantial contradiction and quite unshaken after extensive cross-examination" (p. 32, *infra*).

In Appendix E, *infra*, we have set forth in tabular form a partial compilation of the testimony of the agents we deem refutatory of the court's view that the agents testified without substantial contradiction and remained unshaken by cross-examination.

Indeed, Judge Waterman's contrary appraisal of the testimony led him to state "* * * nor do I believe that no reasonable jury could have acquitted" (p. 53, *infra*). Petitioner's "first assignment of error [in the Court of Appeals had been] there was insufficient evidence to support the finding of guilt, and this he has pressed vigorously on appeal" (Clark, *Ch. J.*, p. 34, *infra*).

C.

When the witness who thus grievously prejudices the defendant's case by conspicuously bringing to the necessarily indelible notice of the jury the fact that the defendant had been arrested for another crime, is an experienced federal law enforcement officer—in a sense, a government witness by profession employed as such by the government—the question arises whether a conviction obtained at a trial thus featured may stand, or whether on the other hand this court in its supervisory role (cf. *McNabb* v. *United States*, 318 U. S. 332 invoked by this Court in *Grunewald et als.* v. *United States*, — U. S. —, 77 S. Ct. 963, 984), should not discountenance the prejudicial evidentiary episode as unworthy of the standards of the administration of criminal justice prevailing in the federal courts and invalidate the conviction.

The testimony of the federal agent is cognizable as government action (cf. *Shelley* v. *Kramer*, 334 U. S. 1, 14) and is to be judged by more vigorous criteria and standards than those which prevail where a casual private witness' role is being assayed (cf. *Lanza et al.* v. *N. Y. State Joint Legislative Committee*, 3 App. Div. 2d 531, rev'g 5 Misc. 2d 324, affd. — N. Y. —, application for stay pending before Mr. Justice Harlan).

It may be that where a casual witness' introduction of incompetent evidence is concerned, practical considerations of avoiding a succession of new trials may cause the courts to deem error cured by an admonition to disregard erroneously injected evidence, despite the acknowledged verity of the now famous statement by Justice Jackson in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 453, as quoted in footnote 4 in Judge Waterman's opinion (p. 53, *infra*):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

See also to the same effect, the dissenting opinion of the late Judge Frank in *United States* v. *Grunewald, Bolich and Halperin* [2 Cir.], 233 F. 2d 556, 573, 574, reversed by this Court on May 27, 1957 (— U. S. —, 77 S. Ct. 963). It is respectfully submitted that this Court's decision therein implicitly gives governing effect to Justice Jackson's words.

In any event, when Treasury Agents are primarily concerned as witnesses, this Court, it is respectfully urged, should apply the *McNabb* doctrine—also applied in this Court's reversal in the *Grunewald, Bolich and Halperin* cases—and not permit a conviction to stand where government agents have prejudiced a defendant's case by injecting into the testimony incompetent evidence of a prior arrest for policy.

United States v. *Giallo* [2 Cir.], 206 F. 2d 207, affirmed 346 U. S. 929 (*Per Curiam*) is not to the contrary since in that case the Court of Appeals stated with regard to the Treasury Agent's unresponsive reference to a defendant's

arrest, "the jury might well have supposed that the arrest [referred to] was on the indictment on which he was being tried" (p. 209 of 206 F. 2d).

Moreover, the very fact that there has been a somewhat similar recurrence of prejudicial incompetent testimony by the very same government agent, Gianatasio, relating to a defendant's prior arrest[7]—if this Court agrees that such was indeed the case—shows the urgent necessity for this Court to invalidate the conviction of appellant under the *McNabb* doctrine as now reaffirmed in *Gruenwald et als. v. United States*, — U. S. —, 77 S. Ct. 963, rev'g 233 F. 2d 556 (2 Cir.).

The failure to invalidate petitioner's conviction conceivably may encourage the growth of a practice by Government law enforcement officers when testifying as witnesses on behalf of the Government in criminal prosecutions of withholding prejudicial evidence which would be inadmissible on direct examination until cross-examination to the detriment of the defendant. Neither the defendant nor his trial counsel should be exposed to the wiles or toying of overzealous or vindictive government witnesses. This Court's disapproval of a practice potentially sharp and inherently unfair to the defendant should be enunciated now before its use becomes widespread.

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[7] Judge Waterman carefully noted this in footnote 1, p. 48, *infra*, which reads as follows:

> "Gianatasio, one of the government witnesses, all of whom were employees of the U. S. Treasury, was an experienced investigator with the Alcohol & Tobacco Tax Division, and had been an employee of the Treasury for more than twenty years. Before this he had been a witness for the Government. For instance, he testified in a case cited in all three of our opinions here, *United States v. Giallo*, 206 F. 2d 207, at 209 and footnote 2 (2 Cir. 1953.)"

II

Petitioner has consistently contended that the search warrant issued by District Judge Weinfeld (p. 432, Original Record) was insufficient on its face and that the government proceeded illegally in view of the wording of Rule 41 (b) (2) of the Federal Rules of Criminal Procedure. Under pertinent provisions of that Rule, a warrant may only be issued to search for and seize any property:

> "(1) * * *
>
> (2) Designed or intended for use or which has been used as the means of committing a criminal offense, or
>
> (3) * * *"

The search warrant and the supporting affidavits (pp. 447-451, Original Record) contain statements that what were sought to be seized and secured are "a number of records and other evidence including monies relating to the *operation of a lottery.*" There was also an averral that wagers were placed inside the premises.

Concededly, the items seized, to wit; books, papers, currency, policy slips, checks and other items found in the butcher shop were not in any sense *contraband* like unstamped whiskey, counterfeit coins, narcotics or stolen vehicles, the latter of which are clearly designed or intended for use, or which has been used, as the means of committing a federal criminal offense. Rather, at most, the policy slips found in the premises could only be the basis of a substantive violation of Sec. 974 or 975 of the New York State Penal Law but not any applicable Federal Law. (See *Batten* v. *United States*, 188 F. 2d 75; *In re Fried*, 161 F. 2d 453; *United States* v. *Snow*, 9 F. 2d 978; cf. *Nelson* v. *United States*, 208 F. 2d 505, which was a case

involving the operation of a lottery in violation of a substantive District of Columbia law, but not applicable in the case *sub judice*. Several of the items seized were at first admitted into evidence but later withdrawn (3a, Government's Appendix).

It is interesting to note that District Judge Noonan, in denying the pre-trial motion of appellant, *in toto*, wrote:

> "We are not here concerned with whether or not the operation of a lottery is, per se, a Federal offense" (p. 57, *infra*).

In any event, it must be conceded that policy or lottery is not a Federal offense. Indeed, in *United States* v. *Kahriger*, 345 U. S. 22, this Court upheld the constitutionality of the applicable statutes herein as a revenue measure (26 U. S. C. Secs. 3285-3294) by rejecting the contention that Congress was attempting to penalize intrastate gambling or to treat it as penal, holding at page 26:

> "The wagering tax with which we are concerned applies to all persons engaged in the business of receiving wagers, regardless of whether such activity involves state law."

Mr. Justice Harlan, in *United States* v. *Calamaro*, — U. S. — (decided June 17, 1957) wrote:

> "It is doubtless true that these provisions, as well as the occupational tax, were designed at least in part to facilitate collection of the excise tax."

Indeed, if Congress had as much as treated wagering as criminal, the law would have been unconstitutional (*Sonzinsky* v. *United States*, 300 U. S. 506, 513; *United States* v. *Calamaro*, *supra*). Thus, not only is lottery not

made a federal crime by the statute herein but there is not even a federal penalty for violation of a state law. If it were, it would also be unconstitutional (*United States* v. *Constantine*, 296 U. S. 287, 294).

Thus, the lottery slips herein were merely evidentiary business records and not a legal subject for search and seizure.

In *United State* v. *Lefkowitz*, 285 U. S. 452, 464-465, this Court wrote:

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."

The decisions of this Court have long distinguished searches of one's house, office, papers or effects merely to get evidence to convict him of crime (cf. *Kremen* v. *United States*, 353 U. S. —, 1 L. ed. 2d 876; 77 S. Ct. 828) from searches such as those to find stolen goods for return to the owner, to take property forfeited to the Government, to discover property concealed to avoid payment of duties for which one is liable and from searches such as those made for the seizure of burglars' tools, counterfeit coins, and illicit liquor in order to prevent the commission of crime (*Wrightson* v. *United States*, 222 F. 2d 556; *Marby* v. *United States*, 293 F. 849; *Boyer* v. *United States*, 92 F. 2d 857; *Hobson* v. *United States*, 226 F. 2d 890; *Steele* v. *United States*, 267 U. S. 505).

The search and seizure herein—which strangely enough was the first of its kind (30)—and the search warrant which authorized the action violated also, we respectfully submit, the constitutional provision against self-incrimination (*United States* v. *Lefkowitz*, 285 U. S. 452, 466, 467, citing *Boyd* v. *United States*, 116 U. S. 616. In the *Boyd* case, Mr. Justice Bradley wrote at page 630:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security * * * but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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GEORGE M. LEHR
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On the Petition

Appendix A

Court of Appeals Opinions

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 132, 133—October Term, 1956.

(Argued November 14, 1956 Decided May 28, 1957.)

Docket Nos. 24019, 24020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SALVATORE APUZZO,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and

FRANK,[1] MEDINA, HINCKS, and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge*.

Salvatore Apuzzo appeals from his conviction on verdict of a jury for failing to register and to pay the special federal gambling tax and for conspiring to commit these crimes. Affirmed.

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[1] Judge Frank heard the argument of this case on the original hearing and on the rehearing *en banc* and voted to reverse and remand, preparing supporting memoranda to that effect. He died, however, before this opinion was written.

ARNOLD D. ROSEMAN, New York City (George M. Lehr, New York City, on the brief), *for defendant-appellant.*

MAURICE N. NESSEN, Asst. U.S. Atty., S.D.N.Y., New York City (Paul W. Williams, U. S. Atty., and George S. Leisure, Jr., Asst. U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

CLARK, *Chief Judge*:

This appeal involves a criminal prosecution presenting generally routine matters, leading to a clearly justified conviction and an appropriate, if light, sentence for this defendant. A single issue, as to testimony about the defendant's arrest fifteen years earlier, presented challenge; and because of its potential importance in the administration of the criminal law after the initial hearing before a panel of Judge Frank, Judge Waterman, and myself, the court ordered another hearing before the full bench.[2] This second hearing on oral argument and further briefs resulted in a majority vote for affirmance.

Salvatore Apuzzo, the defendant, was prosecuted under two informations: one information alleged that he and two codefendants, Samuel Aaron and Ernest Broussard, were engaged during the month of August 1953 in the business of accepting wagers individually and as a copartnership, and that they willfully failed to register and pay the special occupation tax on gamblers in violation of 26 U. S. C.

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[2] Except for Judge Lumbard, who disqualified himself, since he was United States Attorney during the prosecution.

§§2707(b), 3277, 3290, 3291(a), 3292, and 3294. The other information charged the three men with a conspiracy, during the period July 28 to August 5, 1953, to commit those crimes in violation of the general conspiracy statute, 18 U. S. C. §371. Aaron and Broussard pleaded guilty to the second information, only Apuzzo stood trial. The jury found him guilty on both informations. He was sentenced on the first information to a $3,000 fine and 60 days' imprisonment, followed by 4 years' probation; on the second information, sentence was suspended and a 4-year probation period imposed, to run concurrently with that on the first information. He appeals from this judgment of conviction.

It is undisputed that the defendant is the proprietor of a small butcher shop at 363 Lenox Avenue, New York City, and has been in the butcher business for 15 or 20 years. His brother-in-law, Isidori, who had been in his employ as a butcher for 6 years, testified that normally the defendant opened the safe in the store early each morning before going to the market to buy meat. Defendant and Isidori, the same witness stated, worked at the store every evening between 5 and 8 o'clock. Codefendants Aaron and Broussard were employees of the defendant who worked behind the counter of the store at the times in issue here.

From July 28 to August 5, 1953, two federal agents made five visits to the butcher shop between 12:30 and 1:30 in the afternoon, and placed "policy" bets with Aaron and Broussard, who were behind the counter. The two agents testified, without contradiction, that during these visits they saw people lined up in front of the counter placing bets, and that on an occasion when one agent asked Aaron what number had won the day before Aaron pointed to three

numerals which were posted on the front of the scales. Prior to their visit on August 5, 1953, both agents prepared carbon copies of policy slips; and upon entering the butcher shop they made bets with the originals and kept the carbon copies for evidence. During this whole period Aaron and Broussard, in addition to accepting bets, were also engaged in selling meat; and the defendant was never seen in the store by the two agents.

Later in the afternoon of August 5, 1953, pursuant to a valid search warrant, four agents raided the shop, proceeding through the main part of the store to a small room in the rear. All four agents testified, without substantial contradiction and quite unshaken after extensive cross-examination. They established that they found the defendant with two bystanders in the back room inspecting ties which an itinerant tie merchant was trying to sell. As the agents entered the room they wore their badges and announced their identity as federal men. One or more of them had drawn guns. Each agent questioned a different person found in the room, and Agent Lemler was apparently the first to question Apuzzo. Apuzzo at first maintained that he was only a visitor to the store and then claimed he recently rented it from one John Sloan. When Agent Gianatasio searched him Apuzzo produced a wallet containing a car registration listing him as a resident of Scarsdale, but to questions he answered that his address was in the Bronx. Cash in the amount of $1,366 was found on the defendant's person, and several thousand money wrappers and several hundred pads of paper were found in the rear room. . .

The agents and the defendant then proceeded into the front part of the store where the safe was and Apuzzo was asked to open the safe. According to the agents' testimony he denied knowledge of the combination until told it would be necessary to remove the safe from the premises and break it open, when he proceeded to open it. Within the safe were numerous compartments which were then broken open. Within them was found between $10,000 and $11,000 in cash, ownership of which Apuzzo immediately claimed, explaining that he kept it there to avoid having a lien placed on it as part of proceedings pending against him in the Tax Court. Also in the safe were two envelopes containing undated policy slips and some personal papers of defendant.

The agents then asked whether there were any other policy slips in the store. At that juncture, according to the agents, defendant pointed to the scale near which stood codefendant Broussard; and the defendant said, "Ernie, give them the slips." Broussard then removed the weighing platform of the scale revealing about 150 recent policy slips, including the two bets the agents had placed that day. At the trial it was stipulated that defendant did not pay the special tax and did not register.

Apuzzo did not take the stand, but relied for his defense on the testimony of his brother-in-law, Isidori, and codefendant Broussard, both employees of his. On cross-examination it was shown that Broussard had lied about his own participation in the gambling operation when first arrested and had subsequently pleaded guilty and been convicted. It also came out that after his conviction his wife had asked the defendant to rehire him, and at the time of the trial Broussard was again in Apuzzo's employ. Isidori testified

that he, Isideri, was home the afternoon the agents raided the store, and was surprised to receive a telephone call from defendant asking for the combination to the safe. He was surprised because Apuzzo knew the combination and opened the safe each day; Apuzzo sounded very agitated when he called. Broussard testified in regard to the scale incident that Apuzzo told him merely to give the agents the policy slips if he, Broussard, knew anything about them. The explanation advanced by counsel for defendant's evasive behavior when confronted by government men was that he first thought it was a holdup and then feared they were after him in connection with his pending tax matter. The defense was that Apuzzo never knew Broussard and Aaron were conducting a gambling operation in his store.

Defendant's first assignment of error is that there was insufficient evidence to support the finding of guilt, and this he has pressed vigorously on appeal. But this is completely without merit; actually the government presented a very strong case. It became common ground, as the trial progressed, that defendant's butcher shop was the scene of extensive policy operations. Hence the only possible defense was that Apuzzo, the proprietor, was quite oblivious to what was known and obvious in the neighborhood.[3] But this will not hold water. The evidence that the defendant's

[3] The conclusion that he was knowing but tolerant will not suffice, since then he would be devoting the facilities of his shop to the furtherance of the venture and the advancement of the conspiracy. Further, an inference that he would allow his business to assume the reputation of a notorious gambling place out of good nature alone, and with no share of the gain, is hardly reasonable. See *United States* v. *Masiello*, 2 Cir., 235 F. 2d 279, certiorari denied 352 U. S. 882.

employees were openly receiving bets in his little store day after day; that winning numbers were posted on the front of the scale; that policy slips, as well as $10,000 in currency belonging to this apparently petty butcher shop, were found in the safe; that he lied about his identity when first accosted and lied about knowing the combination to the safe; and that he pointed to the scale where the recent policy slips were hidden when it appeared that the jig was up —all this makes the rather pitiful attempts of his employees to take the blame quite patently unsuccessful. In fact, even though it was contradictory and largely discredited, the testimony of the employees actually provided a certain amount of corroboration in details such as the defendant's knowledge of the combination to his safe. On the record the jury could hardly have brought in any other verdict. We turn, therefore, to the question of evidence at the heart of this case.

The incident here involved occurred on the second day of trial, after four government agents had testified and been cross-examined as to the facts already described. The government called the fifth agent, Gianatasio, who testified on direct as to incidents both in the back room and in the main part of the store. The prosecutor, in examining Gianatasio as to the conversation in the back room, brought out the facts mentioned above, that Apuzzo gave a Bronx address despite his Scarsdale car registration and that Apuzzo at first denied being the owner of the store. The defense counsel extensively questioned Gianatasio on cross-examination until the following exchange occurred:

"Q. Did you then have a conversation with the defendant? A. Yes. I—

"Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.

"Mr. Roseman: At this time, your Honor—

"The Witness: You wanted to know what I asked him.

"Mr. Roseman: All right.

"The Court: At this time what?

"Mr. Roseman: I don't want the witness to just keep answering. I would rather ask the questions.

"The Court: You asked him what the conversation was. I didn't know that he had finished.

"Q. Did you tell Mr. Lemler—

"The Court: Had you finished telling about the conversation?

"The Witness: No, sir.

"Q. Did you tell Mr. Lemler—

"The Court: Just a minute. He didn't finish.

"A. When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago. He didn't know the exact date.

"Mr. Roseman: At this time I object to the testimony and move for a mistrial.

"The Court: On what ground?

"Mr. Rosenfan: On the ground that this is prejudicial to the defendant."

The pertinent subsequent colloquy was as follows:

"Mr. Roseman: Yes, but that conversation is prejudicial.

"The Court: You brought it out.

"Mr. Roseman: He [the prosecutor] asked him what the conversation was and he didn't bring it out.

"The Court: Then why did you ask him to repeat it?

"Mr. Roseman: I wanted to see if he was telling the truth.

"* * *

"The Court: It was responsive. I don't see how you can control what the witness said in answer to the question.

"Mr. Roseman: I didn't open any door.

"The Court: You asked him what was said."

Further colloquy ensued both before and out of the presence of the jury, in which the prosecutor pointed out that his questions on direct had been limited to certain particular incidents and defendant's counsel had opened the question of a more general conversation in the back room. The court then reiterated several times its view that defendant had opened the issue and, the witness having sworn to tell the truth, "[h]ow could he possibly suppress part of the conversation?" But ultimately the court consented that counsel research the point over the holiday week-end. When the court reconvened on Monday the judge heard further argument, after which he decided to assume the blame for

bringing out the testimony, but to direct the jury to disregard it. This he did in careful and precise instructions both then and later in his formal charge.[4] But defendant urges that all this was insufficient to save the conviction.

The crux of defendant's contention is that the trial judge erred fatally when he did not keep from the jury the fact, whose truth is nowhere disputed, that fifteen years before this trial Salvatore Apuzzo was arrested for "policy." We are asked to rule that a new trial is mandatory because the jury, having learned this fact, may have inferred from it

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[4] The court's statement to the jury was as follows:

"Good morning, ladies and gentlemen. I am sorry that we had to keep you waiting. All I can do is to assure you that we have not been idle while you have been in there, which probably even in this short period may have seemed to you a lot of time.

"However, at the close of the last session there was a witness on the stand who was asked a question by counsel for the defense and in answering the question said something about the previous arrest of this defendant.

"That ought not to have been brought out. Counsel in asking the question did not expect that it would be brought out, did not try to bring it out, and it was only on my insistence, and I wrongly insisted on it, that he told the whole story that was brought out.

"Now, the reason that the law does not permit testimony with respect to previous arrests is that an arrest means absolutely nothing, just as I told you at the beginning of the case; a man is presumed to be innocent until he is found guilty, and the arrest is nothing more than the information that I was talking to you about, so that it has no bearing on the question in the eyes of the law. And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out."

Finally, in his charge to the jury the next day, Tuesday, the judge further warned the jury as follows:

"Any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

more than was warranted. And so, once the evidence had come out, there was nothing the judge could do to save the trial; an entirely new start was necessary and inevitable. The government claims, however, that the judge was entirely correct, since the defense brought out the evidence, and that in any event the admission could have done no harm in view of the judge's charge and the overwhelming proof of guilt. In Judge Medina's and my opinion the first ground is sound and entirely adequate without need of resort to the second ground.

Preliminarily to our discussion let us summarize the situation as it came before the judge. We have already noted that this particular cross-examination opened up an entirely new conversation. Further we should note these factors: (1) the witness' reply ending, "I asked him if he was ever arrested before" was a responsive and necessary answer to a direct question; (2) with this answer the damage, if any, was done and all the rest was but necessary clarification or repair in order not to leave the witness, the defendant, and the prosecution in an equivocal position where the worst might be suspected as to each; (3) the judge's ruling and the reply of the witness were made when the only objection before the court was that counsel did not "want the witness to just keep answering," and that he "would rather ask the questions"; (4) the judge was initially of the view that the defendant had opened the door and that the witness under oath could not suppress the testimony, but ultimately he decided—quite overgenerously—to assume entire responsibility, a course which obviously would relieve counsel of embarrassment to his

client; and (5) the jury was charged, as precisely as is conceivable, to disregard the testimony.

It is now commonplace that the rules of evidence have tended ever more freely in the direction of admission of all relevant testimony in the light of modern experience that the truth is more often found by full revelation than by concealment. Hence we have the modern principle, stated in the Model Code of Evidence, and now embodied in Uniform Rules of Evidence, Rule 7: "*General Abolition of* * * * *Exclusionary Rules.* Except as otherwise provided in these Rules, * * * (f) all relevant evidence is admissible." And we have often admonished our trial judges to err, if at all, on the side of the admission, rather than the exclusion, of evidence. A trial judge must rule on admissibility quickly and almost by instinct; his instinct ought to be to bring out the truth, rather than to permit a party to cover up a part of his case. It is true that there are certain special privileges, such as that against self-crimination, which rest on a different background; but outside of these the search for the truth should be the lodestone.

Now in this search there are of course areas of irrelevancy where matter is kept from the jury because the danger of prejudice exceeds its probative force. Testimony about a defendant's prior misdeeds is usually excluded on this basis, although the trial judge may allow it in his discretion where it casts particular light on the defendant's identity or specific intent to commit the crime. See *United States* v. *James*, 2 Cir., 208 F. 2d 124, 125; McCormick on Evidence 329 (1954); 2 Wigmore on Evidence §§300-304 (3d Ed. 1940). But the question of possible admissibility

for such purposes[5] was of course never reached, since the prosecutor did not offer it, and the incident did not develop so far as to raise the issue. More pertinent here is the fundamental principle of evidence that a party by asking a broad question of the kind here involved may not object to the admission of the response he draws. See, *e.g.*, *United States* v. *Silver*, 2 Cir., 235 F. 2d 375, certiorari denied *Silver* v. *United States*, 352 U. S. 880; *Fidelity & Deposit Co. of Md. v. Lindholm*, 9 Cir., 66 F. 2d 56, 89 A. L. R. 279; *Pilot Ins. Co.* v. *Wise*, 5 Cir., 61 F. 2d 481; *Pabst Brewing Co.* v. *E. Clemens Horst Co.*, 9 Cir., 264 F. 909; *Riddle* v. *Gibson*, 29 App. D. C. 237; *Clum* v. *Guardian Life Ins. Co.*, D. C. M. D. Pa., 24 F. Supp. 396, reversed on other grounds, *Guardian Life Ins. Co. of America* v. *Clum*, 3 Cir., 106 F. 2d 592, certiorari denied *Clum* v. *Guardian Life Ins. Co.*, 309 U. S. 666; *Artcher* v. *McDuffie*, 5 Barb., N. Y., 147; *Levy* v. *Cascades Operating Corp.*, 176 Misc. 373, 27 N. Y. S. 2d 258, reversed 263 App. Div. 882, 32 N. Y. S. 2d 341, reversed 289 N. Y. 714, 46 N. E. 2d 343; 1 Wigmore on Evidence §18, note 34 (3d Ed. 1940); *Rex* v. *King*, 26 Cr. App. R. 158. This rule is grounded in the realities of trial experience; for generally speaking it is quite impossible for a litigant to compel a hostile witness to respond to questions and simultaneously keep the responses from the jury if and when they contain references to prejudicial incidents, such as prior arrests or convictions. Nor can the responsibility for the testimony be shifted from defense counsel to the trial judge. That counsel tried to withdraw his question after the damage was done did not help his case, nor was his objection at all clear. Indeed it then seemed—as

[5] *E.g.*, to show prior knowledge of the criminality of the act were defendant to rely on the contention noted in note 3, *supra*.

he said in effect—that he was simply trying to introduce a new question without waiting for the witness to complete his answer to the former inquiry.

Moreover, in the circumstances presented here the trial judge would have been well within his discretion in requiring the witness to complete his answer even if proper objection were made. In an effort to show that Gianatasio's earlier testimony about incidents in the back room was fabricated or inaccurate, the defense asked him to relate the whole conversation which passed between himself and Apuzzo. Presumably the question was to show the jury that the witness could not recall the entire conversation or to suggest inconsistencies with the testimony of other agents, though actually they were not present at the conversation. But the witness was cut off before he finished his reply. If he considered the issue sufficiently germane, the trial judge could have allowed the government on redirect examination of the witness to complete the conversation to demonstrate that his story was neither fabricated nor based on hazy memory. Or had the prosecution, on redirect, asked for the full conversation—to avoid prejudice to the government from having suggested a black mark it could not support—it would have been proper, indeed almost necessary, that the judge admit the testimony. This is the familiar doctrine of "Verbal Completeness," see 7 Wigmore on Evidence §§2094, 2115 (3d Ed. 1940), and is designed to prevent limitation of evidence to warp the truth and confuse the jury. Where the testimony necessary to complete the story is hearsay or other excludable matter the trial judge has discretion in deciding whether

or not to permit completion. McCormick on Evidence 132 (1954). The same discretion must be allowed when completeness is sought not on redirect, but in the course of the cross-examination, as here.

Some suggestion for differentiation of this case is made that the defendant's counsel was taken by surprise and that the prosecution engineered the introduction of the testimony. Both grounds are ill founded and irrelevant. It is inconceivable that defense counsel experienced in criminal cases would have indulged in all the extended cross-examination of the government agents without appreciation of the risk involved. His hope of finding some inconsistencies in the evidence must have been tempered by knowledge of the risk of turning up something he would not like. But in any event the sound general principle that a litigant cannot object to, or secure a mistrial for, evidence he himself produces cannot be controlled by the degree of naiveté or sophistication of counsel. So far as the prosecution is concerned, there is nothing remotely to suggest impropriety on the part of the United States Attorney or indeed on the part of the witness unless answering responsively to a direct question can be so termed. But further, the implication that somehow the testimony should be geared to the defendant's objections is surely a dangerous one. It is hard to see how reversal here can be had without the implication that testimony should be manipulated, the last thing this court should even suggest.

The discussion had indicates that, while this prosecution may not be important in itself, the principles of procedure are most important. Particularly where the prosecution

of crime is so important to the welfare of the community as in New York City must we take care lest we place in the hands of shrewd defense counsel an unjustifiable tactic for reversing fair convictions of guilty men. For if the defense can indulge in unlimited cross-examination and seek reversal on what is dredged up, then counsel will surely take advantage of this one-way street. In truth, if mistrials are thus easily secured then traps may be set forth for the judge whose very good nature is later labeled fatal error. Over-all it weakens the judge's control of his courtroom and his outstanding position in trial work. Of course, if through accident or through miscalculation of counsel the jury should learn facts about the defendant so inflammatory that they could not thereafter give him a fair trial, a new trial would be necessary; but neither the trial judge nor we think that the incident involved here even approached such a nature. Here the long record carefully examined shows outstanding skill, patience with the repetitive cross-examinations, and scrupulous care for the rights of the defendant on the part of a judge "distinguished for his courtesy, thoroughness and patience." *Valensi v. Iravani*, 2 Cir., Mar. 29, 1957, —— F. 2d ——, ——. We have not hesitated to reverse district judges when their conduct of a specific trial seems to have resulted in unfairness; we shall stultify ourselves and the administration of criminal justice in this important district if we hold ourselves unable to recognize good trial conduct by a judge and take a case such as this out of his hands for automatic reversal.

In vew of our firm conviction that Judge Dimock acted both fairly and wisely we have not thought it necessary to discuss the other point argued, namely, that in no event

was there error here which persisted beyond the judge's charge and was actually prejudicial. *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779; *United States* v. *Cioffi*, 2 Cir., 242 F. 2d 473; *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, 210, affirmed *Giallo* v. *United States*, 346 U. S. 929.

Other claimed errors do not merit discussion.

Affirmed.

Judge MEDINA concurs in this opinion.

HINCKS, *Circuit Judge*, concurring:

Merely because defense counsel asked Gianatasio to relate his entire conversation with the defendant, the defense was not necessarily precluded, in my opinion, from withdrawing its request when the conversation had been only partially related. After Gianatasio in the course of his testimony said: "I asked him if he was ever arrested before," defense counsel interposed: "I don't want the witness to just keep answering. I would rather ask the questions" and then twice began a question about some other conversation. This made it abundantly plain that the defense was seeking to withdraw its blanket request for the whole conversation. And to have allowed him to proceed with his new line of inquiry would not have left the jury under the erroneous and confusing impression that the Gianatasio conversation with the defendant had been completed. For Gianatasio on a proper inquiry by the judge said bluntly that he had *not* "finished telling about the conversation."

In this situation, I think, the judge erred in insisting on a continuation of the narration of the conversation. I see nothing to suggest that in the situation presented the discontinuance of the narration at the instance of the defense would subject the prosecution to the hazard of an unfavorable inference or would in any way operate to warp the truth or confuse the jury. That being so, I doubt the applicability of the doctrine of "Verbal Completeness" to which the majority opinion refers. But even if at all applicable, the rule of completeness is subject to a very reasonable qualification: "where the remainder [of the conversation] is incompetent not merely as to form as in the case of secondary evidence or hearsay, but *because of its prejudicial character* then the trial judge should exclude if he finds that the danger of prejudice outweighs the explanatory value." McCormick on Evidence, page 132. In other words, when—as here—the continued narration of a conversation will bring in inadmissible matter possibly prejudicial and adds nothing to a solution of the issues, neither the judge nor the opposing counsel may properly cause it to come in. *Gencarella* v. *Fyfe*, 1 Cir., 171 F. 2d 419; *People* v. *Baker*, 290 Ill. 349, 125 N. E. 263; *People* v. *Schlessel*, 196 N. Y. 476, 90 N. E. 44; *Hathaway* v. *Tinkham*, 148 Mass. 85, 19 N. E. 18. 20 Am. Jur., Evidence, Sec. 276; McCormick on Evidence, page 132, footnote 6; 31 C. J. S., Evidence, page 917 and footnote 82.*

Nevertheless, I would affirm the conviction on the ground that the error was not of sufficient substance to require a

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*As to all other claims of error I am in full accord with the majority opinion.

mistrial ** or reversal. The most pertinent Supreme Court precedent is *Lutwak* v. *United States*, 344 U. S. 604. Here, as in *Lutwak*, the evidence of guilt is strong, as the majority opinion shows. Indeed the very strength of that evidence gives "fair assurance * * * that the judgment was not substantially swayed by the error." Thus reversal is not required under *Kotteakos* v. *United States*, 328 U. S. 750, and *Krulewitch* v. *United States*, 336 U. S. 440. In view of the massive weight of evidence pointing to guilt, it would be quixotic to attribute the verdict to the mere narration of an admission of an *arrest* for policy fifteen years earlier, especilly in view of the judge's instruction, promptly made and later repeated in his charge, to disregard the admission of the prior arrest. *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779; *United States* v. *Chieppa*, 2 Cir., 241 F. 2d 635; *United States* v. *Tramaglino*, 2 Cir., 197 F. 2d 928, 932, cert. denied 344 U. S. 864; *United States* v. *Nimerick*, 2 Cir., 188 F. 2d 464; cert. denied 313 U. S. 592. Indeed, one may doubt that the express admission of the prior arrest, which came in and was the subject-matter of cautionary instructions, was as hurtful to the defense as would have been the admission which the jury would naturally have implied from the defense tactic in running away from the conversation which it had invited.

** I think the trial judge was in a better position than we to gauge the effect of the admission of the prior arrest. We should therefore give substantial weight to his evaluation of the problem. *Webb* v. *United States*, 10 Cir., 191 F. 2d 512; *United States* v. *Coffi*, 2 Cir., 242 F. 2d 473; *United States* v. *Giallo*, 2 Cir., 206 F. 2d 207, aff'd 346 U. S. 929.

WATERMAN, *Circuit Judge*, concurring:

I concur with my colleagues in affirming the conviction below. I agree with Judge Hincks for the reasons so ably stated by him—and with Judge Dimock—that witness Gianatasio's[1] statement that Apuzzo told him he had been arrested for policy about fifteen years before introduced error in the case.[2] I disagree with Chief Judge Clark and Judge Medina who maintain this unfortunate statement was a proper one to be made under the circumstances of its making since it was elicited during cross-examination. I affirm because I am convinced from an examination of the stenographic minutes of the proceedings in their entirety that Judge Dimock's subsequent admonitions to the jury to disregard this testimony must have been heeded. I have enough confidence in jurors to believe that in the setting of this particular case—serious though the admission of this damaging inadmissible testimony most assuredly was—the sincerity of the trial judge in stating and restating his personal acceptance of the entire blame,[3]

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[1] Gianatasio, one of the government witnesses, all of whom were employees of the U. S. Treasury, was an experienced investigator with the Alcohol & Tobacco Tax Division, and had been an employee of the Treasury for more than twenty years. Before this he had been a witness for the Government. For instance, he testified in a case cited in all three of our opinions here, *United States* v. *Giallo*, 206 F. 2d 207, at 209 and footnote 2 (2 Cir. 1953).

[2] The error occurred because the trial judge, evidently completely unaware of what the witness would testify to, insisted that the witness continue to answer a question asked of him on cross-examination after he had been stopped by the cross-examiner, despite the cross-examiner's efforts to waive further reply and to ask a new question. In continuing his answer, the witness, so protected by the judge, brought out the damaging testimony.

[3] See Chief Judge Clark's opinion, footnote 4.

and his wish that for that reason the jury ignore the testimony, must have had its effect. Were I not so persuaded I would be forced to dissent—for I do not agree with Judge Hincks that the evidence in the case points so overwhelmingly to the guilt of the defendant as to require affirmance on the ground that the error, had it not been cured, would have been harmless.

Judge Frank was on the panel that heard argument in this case last term, and sat with us *en banc* when it was argued at this term. He was consistent throughout in holding that error was committed here, that this error was not harmless, and that it was not cured. He and I concurred in a proposed opinion written last term before the hearing *en banc* was decided upon that would have reversed the conviction and remanded for a new trial. At this term by memorandum vote after the hearing *en banc*, he reaffirmed his belief that the conviction should be reversed. It is, I think, of importance that his opinion be known, for it demonstrates that three of the five appellate judges who have considered this case concur with the district judge who tried it that the injection into the trial of this statement of a prior arrest was error.

It is fundamental that counsel usually assumes the risk of unfavorable responses to his own cross-examination. But here it seems clear that appellant's counsel was surprised when the fifth government agent he had cross-examined testified to a conversation not foreshadowed by any prior witness; and that when he discovered that the agent might testify to an admission by the defendant of a prior arrest, he did his best to cut off the indicated testi-

mony and close the line of inquiry. The trial judge insisted that the witness complete the unfinished answer despite defense counsel's efforts to prevent reply. This case presents a situation unique on its facts. It seems clear that the testimony concerning the prior arrest came before the jury by accident rather than through any careless or designed "opening up" of a damaging conversation by defense counsel. Surely, therefore, as stated by Judge Hincks, the continuing narrative should not have been testified to.

Apuzzo did not take the stand in his own defense. In fact, the error occurred during the Government's case and before the defense put in any evidence at all, except by way of cross-examination.

I turn now to the question of whether the error was so prejudicial as to require, unless cured by the court's instructions, an automatic reversal of the conviction. Rule 52(a) of the Federal Rules of Criminal Procedure, as well as 28 U. S. C. §2111, admonishes us to disregard any errors or defects which do not affect substantial rights. This command is couched in clear language, but its application presents most difficult problems. See *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir. 1946) (majority and dissenting opinions), *cert. den.*, 329 U. S. 742.

The Supreme Court has stated the test as follows:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the

character of the proceeding, what is at stake upon its outcome and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. * * *

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno* v. *United States*, supra (308 U. S. 287), at 294. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgement was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States*, 1946, 328 U. S. 750, 762, 764-765.

Subsequent to this *Kotteakos* decision we have held that references to prior arrests or convictions, when the defendant does not take the stand and his character is not in issue, are prejudicial error. *United States* v. *James*, 208 F. 2d 424 (2 Cir. 1953); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (2 Cir. 1947), *cert. denied*, 331 U. S. 831. These cases are authority for the proposition that such testimony is prejudicial error when it gets before the jury other than by deliberate or negligent conduct of defense counsel. This is so not because such testi-

mony is irrelevant "but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge." *United States* v. *James, supra,* at page 124. And see *Michelson* v. *United States,* 1948, 335 U. S. 469, 475-476. Obviously this is of particular importance when the prior arrest or conviction is for the same criminal activity.

With these guideposts at hand, I now turn to the overall situation at the trial, as I perceive it to have been.

To convict Apuzzo the Government had to convince the jury by circumstantial evidence and the proven overt acts of Aaron and Broussard that Apuzzo was in the "policy racket" with Aaron and Broussard during the period from July 28 through August 5, 1953. Though federal agents were in the butcher shop on five different occasions during those nine days and placed "policy" bets with Aaron and Broussard they never saw Apuzzo. Both Aaron and Broussard pleaded guilty prior to Apuzzo's trial. Broussard testified for the defense, and absolved Apuzzo of any connection with the "policy" operations. The Government presented a strong circumstantial case through the testimony of government employees tending to prove Apuzzo's complicity; and, although no direct evidence of day-to-day participation on the part of Apuzzo was ever before the jury, there was indeed sufficient evidence to support a finding by the jury of guilt.

Apuzzo's employees testified stoutly, also. If they were believed, there was similarly sufficient evidence to support

a verdict of acquittal. The defense could well maintain that there was insufficient credible proof of any "policy" participation by Apuzzo during the nine crucial days involved.

Although on the record before us it is highly probable that appellant may be guilty as charged, I do not find that this "record fairly shrieks the guilt," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953), of Apuzzo during the time-period involved, nor do I believe that no reasonable jury could have acquitted. See, *e.g.*, *United States* v. *Chieppa*, 241 F. 2d 635, 640 (2d Cir. 1957); *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (2d Cir. 1952) *cert. denied*, 344 U. S. 864.

Therefore, it becomes a most delicate question for an appellate judge who believes that the evidence below of guilt is not completely overwhelming to appraise the effect that Gianatasio's statement may have had. For Gianatasio let the jury know that Apuzzo, himself, allegedly had said to the witness that he had been arrested for "policy" about fifteen years ago. Even though instructed that the statement should be ignored, this statement, erroneously before the jury, could well be the decisive bit to convince a doubting juror of the defendant's guilt.[4]

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[4] See, *e.g.*, the oft-quoted concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949). "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54."

See also the remarks of the late Chief Judge Lehman of the New York Court of Appeals in *People* v. *Robinson*, 273 N. Y. 438, 445-46, 8 N. E. 2d 25 (1937).

Recognizing this danger, I nevertheless hold here that in view of the unique circumstances in this case this error was cured and made harmless by the subsequent considered and sincere instructions of the distinguished, able and conscientious judge. The error would never have occurred but for the insistence of Judge Dimock that Gianatasio complete his answer. This the jury well knew. The Judge accepted the entire blame for the occurrence and absolved defense counsel of any suspicion of deviousness. This also the jury well knew.

The erroneous introduction of an alleged statement by defendant that he had been previously arrested for a similar activity may be considered of such an exceptionally prejudicial character as to necessitate a new trial. See, *e.g.*, *United States* v. *James*, *supra*. But the general rule is that where evidence is erroneously admitted the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. *United States* v. *Giallo*, 206 F. 2d 207 (2d Cir. 1953), aff'd 346 U. S. 929; *United States* v. *Curzio*, 179 F. 2d 280 (3d Cir. 1950); *United States* v. *Marsh*, 82 F. 2d 703 (3d Cir. 1936); *United States* v. *Stoppelli*, 183 F. 2d 391 (9th Cir. 1950); *Samish* v. *United States*, 223 F. 2d 358 (9th Cir. 1955). I believe that the circumstances of this case warrant the application here of that general rule.

Appendix B

Order of Court of Appeals dated June 18, 1957

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE APUZZO,

Defendant-Appellant.

Before CLARK, Chief Judge, and MEDINA, HINCKS, and WATERMAN, Circuit Judges.

On petition for rehearing.

Arnold D. Roseman, New York City,
for petitioner-appellant.

PER CURIAM.

Petition for rehearing denied. Motion for stay of mandate granted in accordance with and subject to the conditions of Rule 28(c) of this court, and bail continued in the present sum of $1500.

C. E. C.
H. R. M.
G. C. H.
S. R. W.
U. S. C. J.J.

Filed:
June 18, 1957

Appendix C

Judge Noonan's Opinion dated December 22, 1954

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 45-283

UNITED STATES OF AMERICA,

Plaintiff,

—against—

SAMUEL AARON, SALVATORE APUZZO and ERNEST BROUSSARD,

Defendants.

MEMORANDUM

NOONAN, D. J.

This is a motion by the defendant, Salvatore Apuzzo, for an order directing the return of certain property, to-wit, books, papers, records, currency, etc., belonging to the defendant, which said defendant claims were unlawfully seized on August 5, 1953, by Agents of the Bureau of Internal Revenue, and directing that such property be suppressed as evidence.

The gist of defendant's claim is that the items seized are not contraband and were not "designed or intended for use or which has been used as the means of committing a criminal offense * * *."

If the defendant in this case was liable to an occupational tax as one who was engaged in conducting a lottery for profit, or collecting wagers for a person so engaged,

such liability could hardly be spelled out by the government without proof that in fact a lottery was being conducted. The same is true if his offense was failing to register. We are not here concerned with whether or not the operation of a lottery is, per se, a Federal offense. Congress, however, has seen fit to make it an offense for one to be engaged in such an endeavor without first paying the tax imposed by law, and registering as required.

It would seem from a reading of all of the papers before me that at least a portion of the seized items tend to indicate the carrying on of a lottery. If additional papers and documents not calculated to demonstrate that ultimate fact were seized, the defendant should specify which of the seized items he contends are not within the former category. A broad generalization to the effect that everything but the lottery slips taken by the agents relate to the butcher business is clearly insufficient.

It is my considered opinion that no useful purpose would be served by having a hearing at this time on the issue as to which papers do or do not relate to the lottery business, or which papers do or do not relate to the butcher business.

The rights of the defendant will be preserved because at the trial only such of the seized items as are relevant and material to the criminal charges would be received in evidence by the trial court.

The motion is, accordingly, denied. So ordered.

Dated, New York, N. Y. December 22, 1954.

GREGORY F. NOONAN
U. S. D. J.

Appendix D

Constitutional Provisions and Statutes Involved

Fourth Amendment, United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 26, United States Code,

"Sec. 2707. Penalties.

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this

subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

"*Sec. 3277. Liability of partners.*

Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax.

"*Sec. 3290. Tax.*

A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

"*Sec. 3291. Registration.*

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

"*Sec. 3292. Certain provisions made applicable.*

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply."

"*Sec. 3294. Penalties.*

(a) Failure to pay tax.

Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * *

(c) Wilful violations.

The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. (Added Oct. 20, 1951, 2:07 p.m., E.S.T., ch. 521, Title IV, Sec. 471(2), 65 Stat. 529)."

Appendix E

Partial Compilation of Testimony

Guthrie	Lemler	Gianatasio
Q. I see. How about the other three men? A. No one had a revolver in their hands. Q. You are sure of that. A. Positive (19).	Q. And at any time did you put these firearms in your hand? A. I did, sir (27).	Q. Is it your testimony that he (Lemler) was holding a gun when he entered the premises? A. Yes, sir (p. 231, Original Record).
Q. You say he (defendant) was searched on that occasion? A. He was (p. 38, Original Record).	Q. Of all four. So that immediately everybody was asked to empty their pockets? A. That's right. Q. They were not searched, were they? A. It wasn't necessary. * * * Q. Your didn't search them, did you? A. No, I didn't (p. 153, Original Record). Q. Did you search him yourself? A. No. I had him remove the things from his pocket and place them on a desk. * * * (26).	Q. Were you present when Mr. Apuzzo was searched? A. Yes, I was (p. 190, Original Record). * * * Q. And Mr. Lemler frisked this defendant, didn't he? A. I think he did. I am pretty sure. Q. You are certain, aren't you? A. I am pretty sure. We always do those things (pp. 198-199, Original Record).
Q. What was his response to the questions in regard to what he was doing there? A. Mr. Apuzzo at the time of the initial questions stated he was just visiting here (p. 38, Original Record).	Q. What did you do then? * * * A. When we got there, I had all four of them identify themselves when other investigators were present. Mr. Apuzzo had a driver's license listing his name as Salvatore Apuz-	Q. Didn't you tell the jury that the defendant said he lived in the Bronx? A. That's correct. That's what he told me. Q. And you had his registration license right in front of you and he

Guthrie (cont.)

Q. What did you overhear? A. There was an additional question of Mr. Apuzzo as to what he was doing there, who he was. He identified himself * * * (21).

Q. Well, you say something happened. I mean if you thought you were being held up, you

Lemler (cont.)

zo at some Scarsdale address, and had $1300-some-odd on his person (25-26).

* * *

Q. In fact, you told him that, Mr. Lemler, because you knew he was the owner and this was his store? A. That's right (p. 162, Original Record).

Q. Did you see the defendant Apuzzo? A. I did.

Q. What was the look

Gianatasio (cont.)

said that? A. Positively (p. 200, Original Record).

Q. What was the nature of that conversation? A. Well, we asked Mr. Apuzzo his name and his address and asked him what he was doing there. He told us that his name was Apuzzo and he gave me a Bronx address and he said he was visiting in the rear (8a, Government's Appendix).

Q. Mr. Gianatasio, did you know before arriving at the premises on August 5, 1953, that he was the owner of the butcher shop? A. Yes, sir.

Q. You knew about it, didn't you? A. Yes, sir.

Q. Did you hear Mr. Lemler say to him (Apuzzo) "We know you are the owner of the premises," when he said he was a visitor? You didn't hear Mr. Lemler say that? A. No (p. 203, Original Record).

Q. Did these people seem surprised when you barged in? A. They didn't expect company.

Guthrie (cont.)

would either say something or put your hands up, or you would notice something. Did you notice these four men do anything? A. No, excepting that they were rather surprised at our entry naturally.

Q. Is that your testimony, that they were just surprised? A. However sir, let us say that they were surprised. That is as fa. as I could say. Of course, the fact that each of our agents and myself wore our badges on our lapels, that would have been an identification, of course, to most anyone.

Q. Would you use the word "startled"? A. Yes, very much so (pp. 91-92, Original Record).

Q. Had you seen this tie salesman showing his wares, and was his box open? A. His box was open on the table that I described before.

Q. And the ties were disarranged? A. The tie box was open.

Q. And was Mr. Apuzzo holding a tie in his hand? A. They were examining ties, evidently buying them (21).

Lemler (cont.)

on his face? A. Not any different than it is now.

Q. He didn't look startled? A. If he did, I didn't notice it.

Q. Did he look amazed? A. I don't recall.

Q. Did he look frightened? A. Not that I noticed (27).

Q. Did you see anything else besides the four men standing? A. Other than the makeshift office.

Q. Nothing else? A. Nothing else.

Q. That is your testimony? A. That's right.

Q. You didn't see any ties there, did you? A. There was a box I later learned had ties, yes.

* * *

Gianatasio (cont.)

Q. They looked startled? A. Yes, they looked startled when they saw the badges.

Q. Did they look startled when they saw the gun? A. They looked startled when they saw something. They were scared.

Q. That's the word, "scared" (p. 206, Original Record).

Guthrie (cont.)

Q. And Mr. Apuzzo told you he was the owner of this shop? A. He did not.

Q. When did you learn that he was for the first time? A. For the first time?

Q. In time? A. In time there was an admission of ownership.

Q. I said when did you first learn that Mr. Apuzzo owned this shop in time? A. When he made the admission thereto.

Q. And when was that? A. That was later that day at 143 Liberty Street.

* * *

Q. Did you ask anyone who owned the store? A. I asked Mr. Apuzzo.

* * *

Q. And did he tell you what he was there for? A. He was visiting.

* * *

Q. You asked him to

Lemler (cont.)

Q. It wasn't opened? A. It might have been.

Q. It might have been. Might Mr. Apuzzo have been holding one of the ties? A. I didn't see him holding any tie (p. 156, Original Record).

Q. What did you do then? A. I knew Mr. Apuzzo by sight when I entered the place prior to that. * * * I knew Mr. Apuzzo by sight before I had entered the premises.

* * *

Q. Did you search him yourself? A. No. * * * I asked Mr. Apuzzo how long he had been running this place, or words to that effect. He said he was operating—he leased the butcher shop. That's all he ran, that part of the business, was the butcher shop. * * *

* * *

Q. What did you do, Mr. Lemler? A. I announced myself as a Government officer. I directed all my questions to Mr. Apuzzo and—

Q. And the reason you directed them to Mr. Apuzzo, you knew he was the owner of the store? A. Oh, yes.

Gianatasio (cont.)

Q. Mr. Gianatasio, did you know before arriving at the premises on Aug. 5, 1953, that he was the owner of the butcher shop? A. Yes, sir.

Q. You knew about it, didn't you? A. Yes, sir.

Q. Did you hear Mr. Lemler say to him "We know you are the owner of the premises" when he said he was a visitor? You didn't hear Mr. Lemler say that? A. No.

Q. But you heard he was a visitor, that he said he was a visitor? A. Yes, sir.

Q. Mr. Lemler didn't say "We know you are the owner; is that right, and you didn't say "We know you are the owner"; is that right? A. That's correct.

* * *

Q. Did he (Lemler) tell you that Mr. Apuzzo

Guthrie (cont.)

open the safe, not knowing he was the owner of the store, is that right? A. That is right.

Q. But you did know he was the owner of the store when you asked him to open the safe, Mr. Guthrie, didn't you? A. A pretty good indication of the fact, yes.

* * *

Q. Now, Mr. Guthrie, you had a pretty good indication judging by your previous answer that he was the owner of the store when you asked him to open the safe, is that the fact? A. Uh, huh.

Q. I can't understand uh huh. A. Yes.

* * *

Q. Prior to entering the store you did not have any indication that this defendant owned the butcher store, did you? A. I did not, no.

Q. Half an hour after you entered you had a pretty good indication that he owned the butcher store, is that it? A. When you say "owned the store," I construe that as domination of the store.

* * *

Q. In effect? A. "Ernie, show them the

Lemler (cont.)

Q. You know before you went in there? A. That's right.

Q. Before? A. Before I went in.

Q. You didn't first find out afterwards, did you? A. No.

* * *

Q. And there came a point, Mr. Lemler, I think you said on direct testimony, that you told Mr. Apuzzo you were going to take the safe downtown, or put it in some warehouse, I think, you said? A. That's right * * *

Q. In fact you told him that, Mr. Lemler, because you knew he was the owner and this was his store? A. That's right

Q. And that was the fellow you were after? A. That's right (pp. 139-140, 151-152, 161-162, Original Record).

Gianatasio (cont.)

was the owner prior to your going to the store; yes or no? A. No.

* * *

Q. Did you question Mr. Apuzzo as the owner of the butcher shop; yes or no? A. Yes.

* * *

Q. Did you hear the defendant tell your partner Mr. Lemler that he was in the butcher business. Yes or no. A. Yes (pp. 203, 230-231, 237, Original Record).

Guthrie (cont.)

slips under the scale," and pointed to the scale, and that was it.

Q. And Mr. Broussard went over to the scale; is that right?' A. That is correct.

Q. At that time did you know the defendant was the owner of the store? A. No, sir, I did not (pp. 90, 97, 100-102, 135, Original Record).

Q. Was there a further conversation with Mr. Apuzzo after the safe had been searched? A. * * * We asked Mr. Apuzzo as to the location of any additional slips in the store. At that time he beckoned to Ernest Broussard, who was behind the counter, toward the front of the store, the north end of it, and said to Ernie—pointed to a scale on the counter and said, "Give them the slips."

* * *

Q. What did he say? A. He said, "Ernie, give them the slips in the scale," and pointed to the scale.

* * *

Q. In effect? A. "Ernie, show them the slips under the scale"

Lemler (cont.)

Q. Now, did you have a further conversation with Mr. Apuzzo after you finished searching the safe? A. Yes. I then told Mr. Apuzzo that I wanted the policy slips on the premises after the safe had been opened. He turned to the butcher, a gentleman named Broussard, I believe, and he pointed to a scale, probably three feet away from where we were standing, and he said, "Give him the slips."

* * *

(172) Q. Did you hear him discuss with Mr. Broussard that if there were any slips to please give them to the Federal officers?

The Witness: Would you mind repeating that question?

Gianatasio (cont.)

Q. Mr. Gianatasio, was there a conversation with regard to policy slips after you came out of the back room? A. Yes. Special Investigator Lemler asked Mr. Apuzzo, after he had opened the safe, he said to Mr. Apuzzo, "Where are the policy slips?"

So I heard Mr. Apuzzo say to Ernest Broussard, who was behind the counter, "Ernie, give him the policy slips in the bottom of the scale," pointing to the scale.

* * *

Q. What did the defendant say? A. The defendant said, "Ernie, pointing to the defendant Broussard and to the safe and the scale, he says, "Give them the slips from the scale."

Guthrie (cont.)

and pointed to the scale, and that was it (pp. 64-65, 110-135, Original Record).

Lemler (cont.)

Mr. Roseman: Read it, please.

(Question read.)

A. Well, he did instruct Mr. Broussard to give me the policy slips, as I related a few moments ago.

Q. Because that is what you were looking for, isn't that right? A. That's right.

Q. He never said "Those are my policy slips," did he? A. He pointed to the scale.

Q. After he spoke to Mr. Broussard, isn't that right? A. At the same time.

* * *

Q. Did Apuzzo point— A. He said, "Give the fellow the slips." He was pointing right to the scale. I was right there.

Q. Did he say there were slips in the scale? A. He said—

Q. Did he say there were slips in the scale? Yes or no, Mr. Lemler. A. No, sir.

Q. And you were saying he pointed, with no words? A. With words.

Q. What were those words, again? A. "Give this fellow the slips." "Give this guy the slips" —to be exact.

Gianatasio (cont.)

Q. Give them the slips? A. From the scale.

Q. From the scale? A. Yes.

Q. Did you tell that to the jury on Thursday? A. Well, I told them—

Q. "Give them the slips from the scale"? A. It was either in the scale, or from the scale, I just don't recall exactly.

Q. You don't recall whether it was "in" or "from"? A. Or "from." I don't recall exactly.

Q. Didn't you tell this jury on Thursday, "Ernie, give them the slips in the bottom of the scale"?

Mr. Leisure: I object to that question, your Honor, this type of cross examination.

The Court: Objection overruled.

Q. Did you say that to the jury on Thursday? A. I may have. I may have said that. I don't—

Q. In fact, if the stenographer read it back you would say you said it? A. Yes, sir, I would.

Q. Now, what was it, at the bottom of the

Guthrie (cont.)

Lemler (cont.)

Q. Meaning you? A. That's right.

Q. Didn't you tell this jury this afternoon, that Mr. Apuzzo said he didn't know about any slips in the store? Did you say that? A. That's right.

Q. Did you say that? A. That's right.

Q. I think you said it three or four times? A. Possibly (26, 31, 33).

Gianatasio (cont.)

scale, from the scale, in the scale, or what was it, Mr. Gianatasio? A. Well the slips were inside the scale.

Q. I didn't ask you that, did I? I said what was said. I didn't ask you where the slips were. I said what did you say that the defendant said? A. Well, whatever I have testified to, I testified to the best of my recollection.

Q. That is right, and what were the words that were used, "in the scale," "from the scale," or "at the bottom of the scale"? A. It may have been "in the scale," "from the scale," or "in the bottoms of the scale." I don't—I don't remember the exact words. It could have been either.

Q. It does not make any difference to you, does it? A. No, sir, it does not.

Q. Any of the words, that does not make any difference to you does it? A. As best I can recall, I try to testify.

Q. Don't you think it is important that you remember the words that were said by this defendant, Mr. Gianatasio? A. Yes, sir, I think so (35, 50-51).